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In the Supreme Court of the United States

October Term, 1968

No. 1,252

MRS. JOHN DE RAISMES STOREY, et al.,
Petitioners,

vs.

WILLIAM T. MAYO, Chairman, and EDWIN L. MASON, and JERRY W. CARTER, Commissioners, as and constituting the FLORIDA PUBLIC SERVICE COMMISSION, et al.,
Respondents.

RESPONDENT CITY OF HOMESTEAD, FLORIDA BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORAI TO THE SUPREME COURT OF FLORIDA

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INDEX

	Page
Introductory Statement	1
Question Presented For Review	2
Statement of the Case	2
Reasons Why the Writ of Certiorari Should be Denied	6
I No violation of equal protection of law indicated	6
II No federal question raised	8
III Section 366.11, Florida Statutes is constitutional	9
Conclusion	10
Certificate of Service	11

TABLE OF AUTHORITIES

	Page
C. W. Pennington, et al v. Town of Sumner et al, 222 Iowa 1005, 270 NW 629, 109 ALR 355 (1936)	9
Shelley v. Kraemer, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836	8
Springfield Gas & Electric Co. v. Springfield, 292 Ill. 236, 126 NE 739, 18 ALR 929, affirmed in 257 U.S. 66, 66 L.Ed. 131, 42 S.Ct. 24	9

STATUTES

Florida Statutes, Section 366.11	9

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INTRODUCTORY STATEMENT

This is a petition to this Court by Mrs. John De Raismes Storey, et al., seeking the issuance of a writ of certiorari to review the judgment of the Supreme Court of Florida entered November 6, 1968 and reported in

217 So.2d 304. The Petitioners do not designate the City of Homestead, Florida (hereinafter referred to as the City) as a respondent, however, the record clearly indicates (Pet. App. p4) that the City was a party in the Supreme Court of Florida and has a clear interest in the litigation. The City assumes by virtue of the foregoing, and in light of the service on the City of the Petition for Writ of Certiorari to the Supreme Court of the United States that it has proper status to file this brief.

All emphasis is supplied unless otherwise indicated.

"Pet.App." is the reference to petitioners' Appendix.

"R" is the reference to the record which was before the Supreme Court of Florida, which we are informed has been properly transmitted to this Court.

QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONERS HAVE ANY RIGHT AS PROTECTED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO SERVICE BY A PARTICULAR UTILITY MERELY BECAUSE OF PERSONAL PREFERENCE.

STATEMENT OF THE CASE

Petitioners' statement is incomplete and is limited to testimony deemed favorable to petitioners. The City restates the case as follows:

This action was initiated on September 20, 1967 by the filing of an application on behalf of the Company, before the Florida Public Service Commission, for approval of a territorial agreement previously entered into with the City of Homestead, a Florida municipal corporation, relative to the establishment of service areas (R. 3-13).

The Commission on October 9, 1967 published a notice of hearing advising the public with respect to the public hearing which was to be held in the City of Homestead for the purpose of considering the application of the Florida Power & Light Company for approval of a service area agreement with the City for the distribution and sale of electricity (R. 14).

All individuals subject to the agreement had previously been contacted by either the Company or the City (R. 58, 59, 112). The Commission specifically found in its Order that the affected customers had been contacted and the nature and effect of the proposed agreement had been explained to the customers (R. 117).

On November 8, 1967 a public hearing, pursuant to the aforesaid notice, was held by the Commission in Homestead, Dade County, Florida. The City and the Company established by testimony and documentary evidence that the territorial agreement being considered for approval by the Commission was in the highest public interest, by reducing or eliminating unwarranted, unnecessary and uneconomical duplication of plants and facilities, which facilities, if duplicated, could only result in excessive cost for both the Company and the City, thus resulting in

the public's payment of higher costs for essential services (R. 30). Witnesses for the Company and the City both established and the public witnesses offered no contrary testimony, that the territorial agreement would promote safety and better services, in that it would provide means by which the Company and the City could avoid duplication, overlapping and paralleling of electrical lines on the public streets and ways, and would materially contribute to the esthetic value of the service area (R. 32, 60). Testimony further established that the agreement would enable the City and the Company to plan the future capabilities of the electrical system so that they might program in advance the development of their respective areas, rather than to be forced into the purchase of expensive plant and line facilities for the purpose of competing, rather than providing, efficient service (R. 60-64). Failure of the Company and the City to be able to plan an orderly expansion of plant and distribution facilities can only result in excessive cost to both parties, and resultant higher costs to the public being served. The service area agreement being considered by the Commission was discussed by the Company and the City for more than three years and was subject to intense negotiations for the period of nearly one year (R. 60-64). At the public hearing, seven individual protesters appeared and registered their objection to the transfer of themselves and certain customers included in the territory subject to the proposed agreement. No testimony was offered by any of these parties to the effect that the agreement between the Company and the City was not in the general public interest (R. 86-102). One of the principle objectors stated that they realized the necessity of eliminating the parallel lines, crossed lines and other duplicating facilities (R. 96).

The City of Homestead has been operating an electrical generating and distribution system for many years and has supplied customers both within and without its corporate limits. In addition to its electrical generating and distribution system, the City operates and maintains a sewerage disposal system and a water supply and distribution system (R. 62, 63, 104). The requirement of future planning in the development of the electric plant and distribution systems of the City, as well as its other public utilities, requires that the general area to be served by the City be established, rather than to allow a chaotic and destructive competitive warfare to exist between the Company and the City where their utility services overlap or merge (R. 60). For the last 43 years, the City of Homestead has never increased their electrical rates to the persons receiving electrical utility service from the City (R. 103-104). In some categories of service, the Company's rates are lower than the City's, and in other categories, the Company's rates are higher (R. 42, 43).

Concluding the said hearing, the Commission entered its Order No. 4285 approving the territorial agreement on December 1, 1967 (R. 114-122) (Pet. App. pp 32-39). The summary of the Commission's Order (R. 119) (Pet. App. p 37) is as follows:

> "In summary, this Commission finds that the evidence presented shows a clear justification and need for the territorial agreement for which approval is sought. The approval of this agreement should better enable these utilities to provide the best possible utility services to the general public at a very reasonable price."

On December 20, 1967, the Petitioners filed a Petition for Reconsideration (R. 122-127 & Pet. App. pp. 40-43), which was denied by the Commission as evidenced by Order No. 4308, which Order was entered on January 19, 1968 (R. 128-129).

The Petitioners thereafter filed a Petition for Certiorari with the Supreme Court of Florida (Pet. App. pp 46-51).

Following submission of briefs and after oral arguments the Supreme Court of Florida affirmed the Order of the Florida Public Service Commission. (Pet. App. pp 1-3, 217 So.2d 304).

A Petition for Rehearing was filed by the Petitioners and was denied by the Supreme Court of Florida on December 12, 1968 (Pet. App. p 19).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

I. No violation of equal protection of law indicated.

The Supreme Court of Florida (Pet. App. p 9) effectively stated the established law as follows:

> "An individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. If he lives within the limits of a city which operates its own system, he can compel service by the City. However, he could not com-

> pel service by a privately owned utility operating just across his city limits line merely because he preferred that service. In the instant situation, these petitioners have not been denied equal protection because they occupy the same status as all users of the municipal power. In the event of excessive rates or inadequate service their appeal under Florida law is to the courts or the municipal council."

The Petitioners are being treated exactly the same as all other persons in their class and the designation of their class is not arbitrary or discriminatory. To infer that they will not receive equal treatment because they do not reside within the corporate boundaries of the city, is not supported by the record nor the actions of the city for nearly one-half century. Uncontradicted testimony at the public hearing disclosed that the city had never raised its rates in more than forty-three (43) years of operation of the electric system (R. 103-104). All customers of the city electric system have equal right to appear before the City Council and, if deemed necessary to protect their interest, to seek redress in the courts.

The City Council of Homestead is a public body, and, as such, acts only after full public meetings, discussions and an opportunity for all to be heard. Cities in Florida are not isolated entities but are surrounded by suburban area dependent upon the cities for business services, streets, police and fire protection and all attendent services rendered by municipalities. Cities cannot exist separate and apart from the surrounding territory but are dependent upon the good will of those pesons residing in adjacent areas, likewise such persons are dependent

upon the cities for the services available within its boundaries. Members of the public affected by the agreement herein approved will have a direct and positive influence upon residents of the city as well as the elected officials. Electric rates have always been fixed by the City Council in its function as a public body (R. 104).

Since the inception of the electric production and distribution system of the city, customers both within and without the municipal boundaries have been fairly and equally served. The fact that during the past fifty years, with all the economic variations, the city has consistently reduced its charges for electrical energy, has applied the same rates to all persons served by the utility, is indicative of the equality and fairness of the city.

II. No federal question raised.

Petitioners attempt to invoke the jurisdiction of this Court and yet produce no authority in support of their contention. The list of citations following their argument does not appear to be relevant to subject matter. Emphasis is given to the case of **SHELLEY v. KRAEMER**, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 3 ALR 2d 441 (1948) which is a decision dealing with restrictive covenants on the basis of race. The other cases cited deal primarily with civil rights, racial or criminal matters and do not appear to have reasonable application herein. Respondent, Florida Power and Light Company, has effectively presented this matter in its brief in opposition and subject Respondent adopts said arguments and citation of authorities.

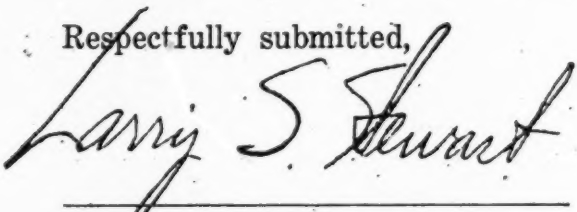
III. Section 366.11, Florida Statutes is constitutional.

The Respondent City of Homestead adopts the argument and law cited by the Respondent Florida Power and Light Company as contained under Section II, page 7 of its brief and in addition thereto, would submit that the Supreme Court of the United States has decided this specific question and upheld the constitutionality of such a provision in the case of **SPRINGFIELD GAS & ELECTRIC CO. v. SPRINGFIELD,** 292 Ill. 236, 126 NE 739, 18 ALR 929, affirmed in 257 U.S. 66, 66 L.Ed. 131, 42 S.Ct. 24. The opinion therein written by Mr. Justice Holmes, upheld the legislative classification between private and public utilities against the objection that it denies equal protection of the laws or operates as an unjust and unlawful discrimination. See also **C. W. PENNINGTON, et al, v. TOWN OF SUMNER et al,** 222 Iowa 1005, 270 NW 629, 109 ALR 355 (1936).

CONCLUSION

By virtue of the foregoing reasons and authority no public interest will be served by permitting review of the decision of the Supreme Court of Florida, affirming the Order of the Florida Public Service Commission. The City of Homestead respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that on this 9th day of May, 1969, as Attorney for Respondent, I mailed one copy each of the foregoing Brief of Respondent, City of Homestead, by first class postage prepaid, except for those noted below as going via air mail prepaid, to all the respective attorneys of record as follows:

To: Irving Peskoe, Attorney for Petitioners, 1000 N. Krome Ave., Homestead, Florida 33030.

To: Philip Goldman, Esq., Scott, McCarthy, Steel, Hector and Davis, Attorneys for Florida Power & Light Company, First National Bank Building, Miami, Florida 33131

To: Prentice P. Pruitt, Chief Staff Counsel, Florida Public Service Commission, 1700 South Adams Street, Tallahassee, Florida 32304, via Air Mail.

To: Lewis W. Petteway, General Counsel, Florida Public Service Commission, Tallahassee, Florida 32304 via Air Mail.

Signed:

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